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FIRST GENERAL COUNSEL'S REPORT

MUR: 6937 CELA
DATE COMPLAINT FILED: May 5, 2015
DATE OF NOTIFICATION: May 7, 2015
DATE OF LAST RESPONSE: June 29, 2015
DATE ACTIVATED: September 9, 2015
EXPIRATION OF SOL:
February 18, 2020 (earliest)
April 15, 2020 (latest)

COMPLAINANT: Foundation for Accountability and Civic Trust

RESPONDENTS: • NextGen Climate Action Committee and Rita
Copeland in her official capacity as treasurer
Braley for Iowa and Theresa L. Kehoe in her
official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30104(b)¹
52 U.S.C. § 30116(a)
52 U.S.C. § 30116(f)
11 C.F.R. § 100.52(d)(1)
11 C.F.R. § 100.111(e)(2)
11 C.F.R. § 104.13(a)(2)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter concerns allegations that NextGen Climate Action Committee ("NextGen")
violated the Act and Commission regulations by making a prohibited in-kind contribution to
Braley for Iowa (the "Committee"), the principal campaign committee of Senate candidate Bruce

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act"), was transferred from Title 2 to new Title 52 of the United States Code.

1 Braley.² Specifically, the Complaint alleges that NextGen made an in-kind contribution when it
2 overpaid the Committee for its e-mail list of campaign supporters and donors in order to help the
3 Committee retire its campaign debts.³ Respondents deny the allegations and request that the
4 matter be dismissed.⁴

5 The available information indicates that NextGen did not make an impermissible in-kind
6 contribution to the Braley Committee, but instead, bought the e-mail list for fair market value
7 after arm's-length negotiations with the Committee. Accordingly, we recommend that the
8 Commission find no reason to believe that NextGen Climate Action Committee and Rita
9 Copeland in her official capacity as treasurer violated 52 U.S.C. §§ 30116(a) and 30104(b); or
10 that Braley for Iowa and Theresa L. Kehoe in her official capacity as treasurer violated 52 U.S.C.
11 §§ 30116(f) and 30104(b). We also recommend that the Commission close the file.

12 II. FACTS

13 From 2007 to 2015, Bruce Braley served as the U.S. Representative for Iowa's First
14 Congressional District. On February 7, 2013, Braley announced his candidacy to succeed
15 retiring Senator Tom Harkin and registered Braley for Iowa as his principal campaign committee
16 the following day.⁵ On November 4, 2014, Republican Joni Ernst defeated Braley in the general

² Compl. at 1.

³ *Id.* at 2-3.

⁴ Braley for Iowa Resp. at 1; NextGen Climate Committee Resp. at 1.

⁵ See Aaron Blake, *Iowa Bruce Braley to run for Senate*, WASHINGTON POST (Feb. 7, 2013),
<http://www.washingtonpost.com/news/post-politics/wp/2013/02/07/iowa-rep-bruce-braley-to-run-for-senate/>;
Braley for Iowa, Statement of Organization (Feb. 8, 2013).

election,⁶ and the Committee reported \$93,577.96 in debts at the end of the campaign.⁷

NextGen Climate is a San Francisco-based environmental advocacy organization founded by businessman and philanthropist Tom Steyer to work "at every level" to support candidates, elected officials, and policymakers who "will take bold action on climate change."⁸ NextGen Climate registered NextGen Climate Action Committee⁹ with the Commission as an Independent Expenditure-only Political Committee ("IEOPC") on July 22, 2013.¹⁰ As an IEOPC, NextGen may solicit and accept contributions from individuals, corporations, and others in excess of the Act's limits.¹¹ During the 2014 election cycle, NextGen made independent expenditures totaling \$18,981,180 supporting and opposing candidates for federal office. Of that amount, NextGen spent \$781,326 promoting Braley and \$4.3 million opposing Ernst.¹²

After the 2014 campaign, NextGen bought the Committee's e-mail list for \$177,817.60. According to the Complaint, this purchase constituted a prohibited in-kind contribution because the transaction was merely an attempt by a Braley supporter, NextGen, to help him retire his campaign debt and thus was not commercially reasonable.¹³ As proof of the alleged unreasonableness of the transaction, the Complaint relies on a newspaper article that describes

⁶ See State of Iowa Winner List, 2014 General Election, Iowa Secretary of State Website, <http://sos.iowa.gov/elections/pdf/2014/general/Winnerlist.pdf>.

⁷ See Braley for Iowa, 2014 Year-End Report.

⁸ Steyer founded NextGen Climate in 2013. See NextGen's website, <https://nextgenclimate.org/about/>.

⁹ NextGen Climate also has a related 501(c)(4) organization called NextGen Climate Action. See California Secretary of State website, <http://kepler.sos.ca.gov/>.

¹⁰ See NextGen Climate Action Committee, Statement of Organization (July 22, 2013).

¹¹ See Advisory Op. 2010-11 (Commonsense Ten).

¹² See NextGen Climate Committee, 48-Hour and 24-Hour Independent Expenditure reports, July 18, 2014 – November 2, 2014.

¹³ Compl. at 1-3.

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1 the list purchase as a "bailout" and as "odd" because it was allegedly the only such list acquired
2 by NextGen after the 2014 elections.¹⁴ Further, the Complaint suggests an ulterior motive by
3 NextGen because the "massive infusion of funds" from the sale resolved "all" of Braley's
4 campaign debt, thus enabling him to terminate his committee and move to Denver, Colorado, to
5 join a law firm.¹⁵ Finally, the Complaint claims that the e-mail list rental at issue in MUR 6775
6 (Ready for Hillary PAC) supports the proposition that NextGen overpaid for the Committee's
7 e-mail list because in that matter, the Commission "approved the lease of a nationwide voter list
8 for a lesser amount of \$133,841.70," making "the large amount paid for" the smaller Braley List
9 above market value."¹⁶

10 Respondents deny the allegations and assert that they did not make or accept an
11 unreported, impermissible in-kind contribution because the list was valued and sold at the "usual
12 and normal charge" following an arm's-length negotiation between the parties. As detailed in
13 the Responses and confirmed by disclosure reports filed with the Commission, the Committee
14 developed an e-mail list containing the names and other information of over 100,000 campaign
15 donors and supporters.¹⁷ At some point after the election, NextGen asked to purchase "the rights

¹⁴ Compl. at 2-3, Ex. A. (Craig Robinson, *Braley's \$177,000 Bailout Courtesy of Tom Steyer*. THE IOWA REPUBLICAN (Apr. 22, 2015)). Disclosure reports indicate that after the Complaint was filed, the NextGen Climate Committee disbursed \$9,800 to the Florida Democratic Party on June 24, 2015 for "list rental." See NextGen Climate Committee, 2015 July Monthly Report.

¹⁵ *Id.*, Exhibit A. Press reports confirm that Braley moved to Denver, Colorado, in April 2015 to join the law firm of Leventhal & Puga. See *Former Iowa Congressman Bruce Braley joins Denver law firm Leventhal & Puga P.C.*, PR NEWswire (Apr. 2, 2015), <http://www.prnewswire.com/news-releases/former-iowa-congressman-bruce-braley-joins-denver-law-firm-leventhal-puga-pc-300060651.html>; see also <http://www.leventhal-law.com/attorney-bruce-braley/>.

¹⁶ *Id.* at 3. Without providing any basis, the Complaint states that "presumably" the Braley e-mail list included voter data "for a single state." *Id.*

¹⁷ Braley for Iowa Resp. at 1, Exs. A and B; NextGen Climate Action Committee Resp. at 2. The Committee paid its digital consultant, Well & Lighthouse, LLC, \$14,658 in September 2013 for expenses related to fundraising lists. Braley for Iowa, 2013 October Quarterly Report.

1 to use the list on an unlimited, ongoing basis.”¹⁸ After removing duplicate names, the list
2 contained 111,136 names, or “subscribers,” and the Committee, in conjunction with its own list
3 broker/digital consultant, Well & Lighthouse LLC (“Well & Lighthouse”), valued the list at
4 \$177,817.60 based on a “blended rate” of \$1.60 per subscriber.¹⁹ As the Respondents explain,
5 the fair market value for the list was based on the Committee’s original cost in building the list,
6 the distribution of subscribers in terms of their past donation and “activity” history, and the past
7 revenue performance of the list.²⁰ NextGen agreed to purchase the list for \$177,817.60 in
8 February 2015.²¹ During the same reporting period as the list purchase (the First Quarter of
9 2015), the Committee paid off its outstanding debts totaling \$97,577.96, while incurring
10 \$46,646.46 in new debt.²²

11 III. ANALYSIS

12 The Act provides that no person shall make contributions to any candidate and his or her
13 authorized committees with respect to any election for federal office which in the aggregate
14 exceed \$2,600.²³ IEOPCs, such as NextGen, are prohibited from making direct or in-kind

¹⁸ Braley for Iowa Resp. at 1.

¹⁹ *Id.* at 1, Ex. A. The Committee’s disclosure reports indicate that Well & Lighthouse provided a number of services to Braley’s 2014 senate campaign, including digital media services, fundraising consulting, and fundraising lists, between September 2013 and November 2014.

²⁰ Braley for Iowa Resp. at 1, Ex. A.

²¹ See NextGen Climate Action Committee, 2015 March Report; Braley for Iowa, 2015 April Quarterly Report. The Committee raised \$832.80 in contributions during this period and reported the e-mail list purchase under the category of “other receipts.” *Id.* According to Braley for Iowa’s most recent disclosure report, the Committee has debts totaling \$72,159.47. Braley for Iowa, 2015 October Quarterly Report, Schedule D.

²² Braley for Iowa, 2015 April Quarterly Report, Schedule D at 30-31.

²³ 52 U.S.C. § 30116(a)(1)(A). Federal Election Commission website, Contribution Limit Chart for 2013-2014. <http://www.fec.gov/info/contriblimitschart1314.pdf>.

contributions to federal candidates.²⁴ Federal candidates and their authorized committees may not knowingly accept an excessive or prohibited contribution.²⁵

A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."²⁶ The Commission's regulations provide that "anything of value" includes all in-kind contributions, including the provision of goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.²⁷ The usual and normal charge for goods means the price for those goods in the market from which they ordinarily would have been purchased at the time of the contribution.²⁸ The regulations specifically include mailing lists as examples of such goods and services.²⁹

The Commission has considered the question of whether the proceeds from the lease or sale of a list of supporters constitute a contribution in a number of Advisory Opinions and determined that such a lease or sale is not a contribution where the asset has a unique quality, was developed by the political committee in the normal course of its operations (and primarily for its own use) rather than as a fundraising vehicle, and had an ascertainable market value.³⁰

²⁴ 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(a); *See* Advisory Op. 2010-11 (Commonsense Ten). *See also* FEC Press Release (Oct. 9, 2014), http://www.fec.gov/press/press2014/news_releases/20141009release.shtml; FEC Agenda Document 14-53-A, Final Rules on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations (Oct. 8, 2014), http://www.fec.gov/agenda/2014/documents/mtgdoc_14-53-a.pdf.

²⁵ 52 U.S.C. §§ 30118(a) and 30116(f).

²⁶ 52 U.S.C. § 30101(8)(A)(i).

²⁷ 11 C.F.R. § 100.52(d)(1), 100.111(e)(1).

²⁸ *Id.* at § 100.52(d)(2), 100.111(e)(2).

²⁹ *Id.*

³⁰ Advisory Op. 2002-14 at 2-4 (Libertarian National Committee); Advisory Op. 1981-53 at 2 (Frazier). *See also* Advisory Op. 1982-41 (Dellums); Advisory Op. 1981-46 (Dellums).

1 Specifically, the Commission has concluded that the lease or sale of a mailing list is not a
2 contribution to a political committee if the following conditions are satisfied: the list was
3 developed by the political committee as a part of its political activities over a period of time and
4 used primarily for its own political/campaign purposes; the sale or lease constitutes a small
5 percentage of the committee's use of the list; and the list, or the leased portion of that list, has an
6 ascertainable fair market value, is sold or leased at the usual and normal charge in a *bona fide*,
7 arm's-length transaction, and is used in a commercially reasonable manner consistent with such
8 an arm's-length transaction.³¹

9 We recommend that the Commission find no reason to believe that the Respondents
10 violated the Act because the record supports the conclusion that the list was (1) created for, and
11 used by the Braley campaign in the ordinary course of campaign activities, (2) sold to NextGen
12 for the usual and normal charge in a *bona fide*, arm's-length transaction, and (3) subsequently
13 used by NextGen in a commercially reasonable manner.³²

14 First, according to a Memorandum prepared by the Committee's digital consultant, Well
15 & Lighthouse, the list was compiled in the ordinary course of campaign activities — the
16 Committee spent two years and \$400,000 building it, and it generated over \$2 million in
17 contributions over that same period.³³ Second, the list was sold as a result of an arm's-length
18 transaction that is evidenced by a written agreement.³⁴ The signed Data Acquisition Agreement
19 includes representations, warranties, and covenants regarding the fair market value of the

³¹ 2002-14 at 4-5 (Libertarian National Committee). These receipts are to be reported in the category of "Other Receipts." AO 2002-14 at 5.

³² See AO 2002-14, at 2-5.

³³ Braley for Iowa Resp. Ex. A. at 2, 3.

³⁴ Braley for Iowa Resp. at 1, NextGen Climate Committee Resp. at 2.

1 Committee data.³⁵ Moreover, the Committee provides a detailed methodology for its
2 determination of the list's fair market value.³⁶ Third, NextGen purchased the list to facilitate
3 programs it anticipated conducting in Iowa in connection with the upcoming 2016 presidential
4 election.³⁷ Although it is unclear how NextGen may have used the list, it has conducted
5 activities related to the 2016 Democratic Party primaries and caucuses, and Iowa hosts the first-
6 in-the-nation caucus.³⁸ NextGen also claims to connect with potential volunteers and supporters
7 through e-mail as well as social media.³⁹ Given these activities, it would be reasonable to infer
8 that NextGen used the list to reach supporters and volunteers in Iowa. NextGen's purchase of

³⁵ *Id.* The Data Acquisition Agreement was signed by the comptroller for the Committee on January 22, 2015 and NextGen Climate's Chief Financial Officer on February 9, 2015. Braley for Iowa Resp., Ex. B at 5.

³⁶ According to Well & Lighthouse's Memorandum, the "blended rate" of \$1.60 per name, which resulted in a valuation of \$177,817.60 for 111,135 names, was based on three primary factors: organizational costs, per name cost of e-mail acquisition on the open market, and recent activity and revenue performance of the list. Braley for Iowa Resp., Ex. A at 1, 3. The Memorandum states that the original cost to build the list was significant (\$1.63 per name) and provided the initial benchmark to value the entire list. The Memorandum also asserts that the list was properly compared to retail or premium data costing between .50 - \$2.00 per subscriber because the Braley Committee's data was "geographically connected to the first Presidential primary" in Iowa and was, therefore, "unique" and "compelling." *Id.* Ex. A at 1, 2. Further, the Memorandum includes a chart outlining prices charged by six other data list vendors to further to support the \$1.63 retail/premium price assigned to the Braley data. *Id.* Ex. A at 2. Finally, the Memorandum states that the ability of the Braley Committee to raise large amounts of money through the donors on the list demonstrated its "high-retail to premium" quality. *Id.* Ex. A at 3. Specifically, the Memorandum asserts that the Committee's digital fundraising program from the donors on the list raised over \$780,000 for the campaign. *Id.*

³⁷ NextGen Climate Committee Resp. at 2

³⁸ Disclosure reports filed since the beginning of the year also indicate that NextGen has conducted polling, put staff on the ground in Iowa, and is organizing activists, students, and community members in Iowa through its "Reverb Tour," which includes sponsoring student "watch parties" of a Democratic Presidential Debate and organizing "Demanding Climate Solution Action Events." See NextGen Climate website, <https://ia.nextgenclimate.org/on-the-ground/nextgen-climate-democratic-debate/>; <https://ia.nextgenclimate.org/campuses/drake-university/>. See also, NextGen Climate Committee, 2015 Monthly Reports (March - Oct.). These disclosure reports indicate the committee has disbursed funds for polling, digital and print advertisements, billboards, data analytics, staff, events, travel, and consulting.

³⁹ NextGen Climate Committee Resp. at 2.

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the list, therefore, appears to meet the requirements for a *bona fide* commercial transaction and was not a contribution to the Committee.⁴⁰

Finally, the Complaint's comparison to the e-mail list rental in MUR 6775 fails to establish that NextGen's payment exceeded the fair market value of the list.⁴¹ NextGen's list purchase is easily distinguishable; the transaction in MUR 6775 was a one-time license for an e-mail list, whereas NextGen bought the Braley list outright for unlimited use. In addition, the record here includes a detailed evaluation of the fair market value of the Committee's list, information that was not presented in MUR 6775. Thus, the e-mail list rental in MUR 6775 provides little guidance for the fair market valuation here.

Accordingly, we recommend that the Commission find no reason to believe that the NextGen Committee made, and the Braley Committee received, an unreported, impermissible in-kind contribution in violation of 52 U.S.C. §§ 30104(b) and 30116.

V. RECOMMENDATIONS

1. Find no reason to believe that NextGen Climate Action Committee and Rita Copeland in her official capacity as treasurer violated 52 U.S.C. §§ 30116(a) and 30104(b).
2. Find no reason to believe that Braley for Iowa and Theresa L. Kehoe in her official capacity as treasurer violated 52 U.S.C. §§ 30116(f) or 30104(b).
3. Approve the attached Factual and Legal Analysis.
4. Close the file.


⁴⁰ And, as an IEOPC, NextGen is strictly prohibited from making direct or in-kind contributions to a candidate committee. See Advisory Op. 2010-11 (Commonsense Ten).

⁴¹ MUR 6775 (Friends of Hillary PAC) related to whether Hillary Clinton triggered candidate status in connection with the one-time rental of an e-mail list to the Super PAC, Friends of Hillary PAC. First Gen. Counsel's Rpt., MUR 6775 (Ready for Hillary PAC, *et al.*): The Commission concluded that she had not triggered candidate status by virtue of the rental of the e-mail list to Friends of Hillary PAC. Commission Certification, Ready for Hillary PAC, *et al.* (February 11, 2015).

5. Approve the appropriate letters.

12.1.2015
Date


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